**KHOO CHEE KEONG**

**v.**

**PP**

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN JC
[CRIMINAL APPLICATION NO: MT(3) 44-23-2003 &
CRIMINAL REVISION NO: MT(4) 43-10-2003]
20 APRIL 2004

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Application by accused for bail - Non-bailable offences - Whether ought to be reduced to bailable offences - Whether drugs listed in First Schedule to Dangerous Drugs Act 1952 - Dangerous Drugs Act 1952, ss. 12, 37, 39A(1), (2), 41B(1)(a)*

***CRIMINAL PROCEDURE:*** *Bail - Granting of - Non-bailable offences - Whether ought to be reduced to bailable offences - Whether drugs listed in First Schedule to Dangerous Drugs Act 1952 - Dangerous Drugs Act 1952, ss. 12, 37, 39A(1), (2), 41B(1)(a)*

***CRIMINAL PROCEDURE:*** *Charge - Reduction of - Trafficking in dangerous drugs - Section 39B(1)(a) Dangerous Drugs Act 1952 - Whether premature of court to reduce charges before trial proper*

The accused ('applicant'), who was charged with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), applied to be released on bail pending the hearing of the charges against him. The offences he was charged with were punishable with death pursuant to s. 39B(2) of the Act, and it was specifically provided in s. 41B(1)(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death. The applicant submitted that since the drugs in question fell outside the scope of ss. 37, 39A(1) and (2) of the Act, the charges ought to be framed under s. 12(2) of the Act (or alternatively, the Poisons Act 1952) thereby entitling an application for bail. The applicant also averred that when there was a doubt as to whether a charge for an offence should be framed as a serious or less serious charge, the accused should be made to face only the less serious charge.

**Held (dismissing the application):**

**[1]** The nature and type of charge to be framed against an accused person in a particular case is the prerogative of the Attorney General as the public prosecutor. The jurisdiction of the court to interfere with a charge and frame or amend it only comes into effect **after** the necessary evidence or facts have been adduced before the court. Thus, in the present case, it would be **premature** for the court to decide, at that particular stage of the proceedings, whether the charges as they were framed against the applicant were wrong and therefore ought to be reduced to charges under s. 12(2) of the Act. (p 886 f-h)

**[2]** The drugs that the applicant was alleged to have trafficked in were listed in the First Schedule to the Act; therefore, under the definition of "trafficking", a charge may be framed under s. 39B(1) of the Act for trafficking in dangerous drugs quite independently of ss. 12, 37 or 39A(1) and (2) of the Act and without invoking any presumption. No minimum weight or quantity of a dangerous drug (as listed in the First Schedule to the Act) was required for such a charge to be framed by the prosecution. Thus, although s. 39A(1) of the Act appeared to mean that not all convictions for trafficking under s. 39B(1) of the Act would consequently and necessarily carry the mandatory death penalty provided in s. 39B(2) of the Act, this application had to be dismissed by virtue of the express provision in s. 41B of the Act. (pp 888 d-e & 890 f-g)

**Case(s) referred to:**
*Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183* ***(refd)***
*Leong Siew Hoong v. PP [1988] 1 MLJ 396* ***(refd)***
*Shukri Mohamed v. PP [1995] 3 CLJ 799 SC* ***(dist)***

**Legislation referred to:**
Criminal Procedure Code, s. 323
Dangerous Drugs Act 1952, ss. 12(2), 37, 39A(1), (2), 39B(2), 41B(1)(a)
Federal Constitution, arts. 8, 145(3)
Poisons Act 1952, ss. 2, 32(2)

*For the applicant - G Subramaniam Nair; M/s Maniam Nair & Co*
*For the respondent - Teo Say Eng, SDPP*

*Reported by Suresh Nathan*

## JUDGMENT

**KP Gengadharan Nair JC:**

The accused stands charged under s. 39(B) of the Dangerous Drugs Act 1952 (the Act) in the Magistrates' Court at Johor Bahru as follows:

> 1) Bahawa kamu pada 16/8/2003 jam lebih kurang 11.30 pagi dihadapan rumah no. 8, Jalan Rusa 4, Taman Century, Johor Bahru dalam Daerah Johor Bahru Dalam Negeri Johor, bagi pihak diri kamu atau sesiapa telah didapati mengedar dadah jenis Pil Erimin 5 sejumlah 8,750.0 biji dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) akta yang sama.
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> 2) Bahawa kamu pada 16/8/2003 jam lebih kurang 11.30 pagi dihadapan rumah no. 8, Jalan Rusa 4, Taman Century, Johor Bahru dalam Daerah Johor Bahru Dalam Negeri Johor, bagi pihak diri kamu atau bagi pihak sesiapa telah didapati mengedar dadah jenis Ketamin seberat kasar 2056.0 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

The offences are punishable with death as provided for in s. 39B(2) of the Act and it is specifically provided in s. 41B(1)(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

Section 41B of the Act states as follow:

> No bail to be granted in respect of certain offences.
>
> (1) Bail shall not be granted to an accused person charged with an offence under this Act:
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or
>
> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) the provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

Although the accused is not entitled to bail as a result of s. 41B of the Act, nevertheless, the accused had applied for bail in the Magistrate's Court upon being charged contending that the drugs stated in the charges ie, Pil Erimin 5 and Ketamin are not amongst those specifically stated in s. 37 and/or in s. 39A(1) and (2) of the Act and hence cannot be the subject matter of a charge under s. 39B(1) of the Act.

By a letter dated 13 September 2003 the learned counsel for the accused sought the High Court's intervention by way of revision in this matter of the refusal of bail by the learned magistrate. The ground raised was that the charges are wrong in law as the drugs, Pil Erimin 5 and Ketamin, are outside the scope of ss. 37, 39A(1) and 39A(2) of the Act. It was also contended on behalf of the accused that the charges ought to be under s. 12(2) of the Act and consequently bailable.

When the matter came up before me I told the accused's counsel that such an application to the High Court which, in essence, is actually for bail ought to made by way of a formal motion rather than by attempting to invoke the court's powers of revision as set out in s. 323 of the Criminal Procedure Code (Act 593).

Thereupon, the accused applicant filed a notice of motion for his release on bail pending the hearing of the charges against him although the said charges under s. 39B(1) of the Act are non bailable as stated earlier.

The learned counsel for the accused applicant submitted before me (as he had submitted before the learned magistrate) that the drugs, Pil Erimin 5 (Nimetazepan) and Ketamin fall outside the scope of the presumptions contained in s. 37 of the Act and further that the said drugs are also outside the scope of s. 39A(1) and (2) of the Act as they have not been included therein. In the circumstances, it was his submission that as the said drugs are outside the scope of these sections the accused had been wrongly charged and ought not be denied bail pending the hearing of the charges against him. According to the learned counsel the charges ought to be framed under s. 12(2) of the Act or alternatively the accused applicant should be charged under the Poisons Act 1952. He further submitted that it would appear that the charges against the accused applicant had been framed under s. 39B(1) of the Act merely for the purpose of denying the accused applicant bail.

A further point submitted upon was that when there is a doubt as to whether a charge for an offence should be framed as a serious or less serious charge, ie, higher or lower degree of seriousness, the accused should be made to face only a charge which is less serious. Learned counsel referred me to the then Supreme Court's decision in *Shukri bin Mohamed v. Public Prosecutor* [1995] 3 CLJ 799 wherein Edgar Joseph Jr, FCJ (as he then was) stated that:

> It is a familiar canon of construction that where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly penal statute – and, a *fortiori*, where what is at stake is human life – that in favour of the accused should be adopted. We are supported in this by the following passage in *Maxwell on Interpretation of Statues* (11th Ed) at pp 254-255, which reads:
>
> > But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.
> >
> > When, therefore, as here, the court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness the court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

It should be noted that in the aforesaid case, as I pointed out to learned counsel during the submission, the decision to reduce the charge was only made after the hearing in the High Court and it was based on the evidence adduced before it. This decision of the then Supreme Court cannot be an authority, in my view, for a court to reduce a charge before the trial proper. The nature and type of a charge to be framed against an accused person in a particular case is the prerogative of the Attorney General, the Public Prosecutor. The courts' jurisdiction to interfere with a charge and frame or amend a charge only comes into effect after the necessary evidence or facts have been adduced before the court. Thus, in this present case it would be premature for the court to now, at this stage of proceedings, decide whether the charges as currently they are framed against the accused applicant are wrong and therefore ought to be reduced to charges under s. 12(2) of the Act and which is punishable under s. 12(3) of the Act with a fine not exceeding RM100,000 or to imprisonment for a term not exceeding five years or to both which charge then would enable the granting of bail.

Article 145(3) of the Federal Constitution provides that:

> The Attorney General shall have power, exercisable at this discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

Abdul Hamid Omar LP (as he then was) held in *Karpal Singh and Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 that:

> The discretion vested in the Attorney General is unfettered an cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau*, *Long bin Samat & Ors v. PP*, *PP v. Datuk Harun bin Haji Idris and Ors* and *Poh Cho Ching v. PP*.

His Lordship went on in that judgment to state that:

> In matters like criminal law of a purely domestic nature, our view is that the court will only exercise its inherent powers when there is miscarriage of justice. The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions.

The aforesaid judgment, however, then cautioned as follows:

> to avoid any doubt in future, we should clarify that we have and will not abdicate our responsibility to act as a watchdog within constitutional limits to ensure that any authority is not *ultra vires*. Legislature, when creating codes, can only foresee the most natural and ordinary events and no rule can regulate for all the time and for all the circumstances to protect citizens against all modes of inconvenience and discomfort which are finite in number. In the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not posses the powers to do the right and to undo wrong in the course of administration.

A further point of submission on behalf of the accused applicant was that art. 8 of the Federal Constitution stipulates that all persons are equal before the law. Reference was made to two cases in the Magistrate's Court in Johor Bahru (Case Nos. B83-2509-03 & B83-2513-03) said to be involving more than 6000 liters of cough mixture, codine, in which cases the charges were framed under s. 13(a) of the Poisons Act 1952 and punishable by a fine not exceeding three thousand ringgit or by imprisonment for a term not exceeding one year or both under s. 32(2) of the said Poisons Act. It was submitted that similarly the

accused applicant in the present case should not have been charged under s. 39B(1) of the Act but with a lesser charge thus entitling the granting of bail pending the hearing. With respect, this submission was misconceived as the charges that the accused applicant is, in fact, now facing are that of trafficking in dangerous drugs under the Act.

Section 2 of the Act defines "trafficking" as follows:

> "Trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

and "dangerous drug" is defined as follows:

> "Dangerous drug" means any drug or substance which is for the time being comprised in the First Schedule;

The drugs that the accused applicant is alleged to have trafficked in are listed in the First Schedule to the Act and therefore under the definition of "trafficking" a charge may be framed under s. 39B(1) of the Act for "trafficking" in dangerous drugs. This can be done quite independently of s. 12, s. 37 or s. 39A(1) & (2) of the Act and without invoking any presumption. No minimum weight or quantity of a dangerous drug (as listed in the First Schedule) is required for a charge of "trafficking" in dangerous drug to be framed by the prosecution. All that it means is that the presumption set out in s. 37(da) of the Act cannot be invoked by the prosecution unless the dangerous drug is listed in and is within the prescribed limits of s. 37(da). In the present case the drugs which are the subject matter of the charges do not fall within s. 37(da) of the Act. Thus, in such a case the onus is on the prosecution to prove actual trafficking without resorting to the aid of any as the presumption referred to in s. 37(da) of the Act. Sections 39A(1) & (2) of the Act, too, have no relevance to the present case as those are confined to the imposition of an increased penalty in respect of dangerous drugs specifically set out therein. These sections do not refer to the offence of "trafficking". Thus, the prosecution could, infact, charge a person with trafficking in any dangerous drug provided that the drug is one of those specified in the first schedule to the Act.

In *Leong Siew Hoong v. Public Prosecutor* [1988] 1 MLJ 396 the accused who was charged with trafficking in dangerous drugs under s. 39(B)(1) of the Act applied for bail pending the hearing of the charge against him contending that the net weight of the drug (heroin) referred to in that charge could be below the amount specified in s. 39(A)(1) of the Act for which the sentence

would be a term of imprisonment of not more than five years, and argued that consequently the restriction in respect of the granting of bail imposed by s. 41 of the Act was not applicable. KC Vohrah J (as he then was) in dismissing the application for bail stated, *inter alia*, as follows:

> This case, however, does not essentially turn on the weight of the heroin specified in the charge. In the present case, the amount indicated in the charge is 35 grammes of heroin, no doubt the gross weight. But the crucial question in this case is, "what is the offence the accused is charged with?" He is charged with the offence of "trafficking" in a dangerous drug, heroin, an offence punishable, under section 39B(2), with death. Given the definition of "trafficking" in section 2, it does not matter in what amount of the dangerous drug an accused is charged with trafficking – it is trite law that if he trafficked in one gram of dangerous drug, the sentence is still death.
>
> Since the offence he has been charged with under the Act is punishable with death, it falls within the provisions of section 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

There is, however, in my humble view, one difficulty in arguing that the amount of a dangerous drug an accused is charged with trafficking is not material and that even if the trafficking is in respect of one gram the sentence is still death. Section 39A(1) of the Act was specifically enacted to provide for the imposition of an increased penalty where the subject matter of the charge falls within the prescribed amount of certain dangerous drugs named and/or listed in the said section of the Act.

Section 39A(1) of the Act commences as follows:

> Every person found guilty of an offence against this Act where the subject matter of the offence is ... .

and then after setting out the types of drugs and the respective prescribed weights concludes thus:

> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for a term which shall not be less than two years, but shall not exceed five years, and he shall also be punished with whipping of not less than three strokes but not more than nine strokes.

It is to be noted thus, that when s. 39A(1) of the Act provides "shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty" it could cover the case of a person who has been found guilty of trafficking (under s. 39B(1) of the Act) in a dangerous drug listed in and within the prescribed limit in s. 39A(1) of the Act. Thus, if a person is found guilty of trafficking (under s. 39B(1) of the drug, say, for example, 5 grammes of heroin that person instead of being liable to the death penalty under s. 39B(2) of the Act would appear to be liable to the punishment under s.39A(l) of the Act. This raises the question, therefore, as to what is the penalty imposable upon a person found guilty of an offence under s. 39B(1) of the Act in respect of a drug that is listed in and within the prescribed limits under s. 39A(1) of the Act? The position is quite clear as far as s. 39A(2) of the Act which provides for a heavier punishment than that in s. 39A(1) of the Act is concerned as it expressly stipulates that the said s. 39A(2) of the Act is not applicable to a person found guilty of an offence punishable with death. Section 39A(2) of the Act commences with the following clause:

> Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is:

and concludes as follows:

> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

It (s. 39A(1) of the Act) thus appears to mean that not all convictions for trafficking under s. 39B(1) of the Act would consequently and necessarily carry the mandatory death penalty provided in s. 39B(2) of the Act.

Be that as it may, as s. 41B of the Act expressly provides that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death as is the case with the offences alleged against accused applicant the application for bail was dismissed.